

Prop. Leg.
OLC RECORD COPY
Letter pgy

OLC 78-0487/33

25 September 1978

MEMORANDUM FOR THE RECORD

SUBJECT: Civil Service Reform Legislation

1. Attached are six (6) suggested technical amendments and report language for the Civil Service Reform legislation (S.2640/H.R. 11280), which is now being considered by House and Senate conferees. These proposals were discussed with Mr. David Minton and Mr. Paul Rosenthal by the undersigned and OGC.

STAT

2. Briefly the reaction of Messrs. Minton and Rosenthal was as follows:

(a) Report language to clarify the status of the CIA vis-a-vis laws related to preference eligibles.

-- Minton agreed

-- Rosenthal said it seemed O.K. and will check further

(b) Adding the words "as amended" to the statutory citations in section 2304 of Title I of the House bill.

-- Minton and Rosenthal had no problem

(c) Clarify the authority of the Special Counsel to investigate withholdings under the FOIA.

-- Minton will think about this one further

-- Rosenthal said the Senate will probably go with the House version including the proviso on intelligence information.

(d) Reporting by the Special Counsel to the GAO (House version) or to the Congress (Senate version).

-- Minton said the House probably would go with the Senate version

-- Rosenthal said the Senate probably would not require reports to GAO but that the Special Counsel would have authority to review reports

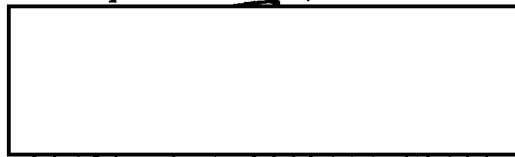
MORI/CDE

(e) Report language to clarify the appeals authority under the bill.

- Minton said he would check into this
- Rosenthal thought our suggested language was not necessary but agreed to think about it further

(f) Substitution of the term "protected against" in place of "prohibited from" at certain places in the legislation concerning disclosure of intelligence information.

- Minton said he had no problem with our suggestion, but during a subsequent phone call later in the day, said he was inclined to view our proposal as a substantive change that would further limit the priority of the Special Counsel, and that he was more inclined to stick with the current language
- Rosenthal said he would take another look at the Senate report language
- Both Minton and Rosenthal indicated a willingness to accept some report language emphasizing that all of these provisions were intended to protect intelligence information, which is now protected in one form or another (by statutory or Executive Order provisions)

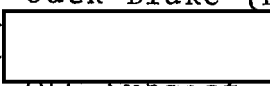



STAT

Chief, Legislation Staff

Distribution:

Original - OLC/Legislation Staff

- 1 - Jack Blake (DDA)
- 1 -  (DD/OP)
- 1 -  (OGC)
- 1 - OLC Subject
- 1 - OLC Chrono

OLC:RLB:mao (25 Sept 78)

STAT

CLARIFICATION OF THE AUTHORITY OF THE SPECIAL COUNSEL
UNDER SECTION 1206 OF S.2640/H.R. 11280 TO INVESTIGATE
CERTAIN WITHHOLDINGS OF INFORMATION UNDER THE
FREEDOM OF INFORMATION ACT (5 USC 552)

Subparagraph 1206(f)(1)(C) of S.2640 and subparagraph 1206(e)(1)(C) of H.R. 11280 grant authority for the proposed Special Counsel to investigate certain withholdings of information under 5 USC 552, the Freedom of Information Act (FOIA). In explanation of this authority, the Senate Report on S.2640 states that 1206(f)(1)(C) "refers to 5 U.S.C. 552 (a)(4)(f) which relates to court findings that information may have been withheld arbitrarily or capriciously" (S. Rep. No. 969, 95th Cong., 2d Sess. 36(1978)). Subparagraph 1206(e)(1)(c) of H.R. 11280 specifies that the Special Counsel shall investigate "arbitrary or capricious withholding(s) prohibited under" 5 U.S.C. 552, but that the Special Counsel shall have no authority to investigate "any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order."

The concern is that the authority of the Special Counsel in this area be consistent with the scope of his authority elsewhere in section 1206 to investigate matters involving foreign intelligence or foreign counterintelligence information the disclosure of which is prohibited by law or by Executive order.

Whether this issue is treated in terms of clarification that the authority extends only to 5 U.S.C. 552(a)(4)(f), as in the Senate bill-- which limits the authority to withholdings determined by a court to be arbitrary or capricious--or by a specific limitation as to foreign intelligence or counterintelligence information as in the House bill, it is important that the provision maintain the status quo as regards the authority of the outside authority (currently the Civil Service Commission; the Special Counsel under the Civil Service Reform Act) to investigate withholdings of national security information. To alter the status quo could upset current relationships between Executive agencies and outside review of intelligence information, and would be inconsistent with other provisions of section 1206 that relate to such relationships and which reflect the intent of both Houses to maintain the status quo.

DIFFERENCE BETWEEN A PROVISION IN SUBSECTION 1206(e)
OF S. 2640 AND IN SUBSECTION 1206(c) OF H.R. 11280 ON
THE MATTER OF CERTAIN REPORTS BY THE SPECIAL COUNSEL

Section 1206 in both the Senate and House bills requires that the head of an agency prepare a detailed report regarding the results of agency-conducted investigations into certain allegations raised by an employee to the Special Counsel. The Senate version in Section 1206(e) requires that the report, upon completion, be forwarded in paragraph (c)(6) and clause (c)(2)(B)(ii) of section 1206 to the Congress while the House version requires that the report be directed to the General Accounting Office (GAO).

The CIA strongly favors the Senate version as there is already established a system whereby CIA information is relayed to the Congress, wherein exists already established and functioning systems whereby Congress may review, comment upon and, indeed if necessary or desirable, probe further into subject matter provided by this Agency.

To give this type of authority to GAO would not only be a departure from already existing oversight mechanisms but would, moreover, grant GAO new authority to delve into CIA provided information which could, at some point in the review process, lead to information which the Director of Central Intelligence by virtue of statute, might not be able to release to the GAO, but could, with little difficulty provide the appropriate Committees of the Congress.

It is therefore, in summary, our position that the Senate version whereby the report is forwarded to the Congress is strongly preferred and is moreover consistent with current practices and procedures.

**SUBSTITUTION OF THE TERM "PROTECTED AGAINST" FOR
"PROHIBITED FROM" AT THOSE PLACES IN SECTIONS 2302
AND 1206 OF S. 2640/H. R. 11280 IN THE CONTEXT OF PROTECTING
AGAINST DISCLOSURE CERTAIN CATEGORIES OF INFORMATION**

Both the House and Senate versions of the Civil Service Reform Act recognize that certain information that is protected from disclosure by law or by Executive order must and should be treated differently from other information. This matter arises in the context of "prohibited personnel practices"--section 2302--and in the context of the authorities of the Special Counsel to receive and investigate certain allegations--section 1206. The relevant language is formulated generally so as to include any "disclosure not specifically prohibited by law" or any "information not specifically required to be kept secret by Executive order." Such language is included in sections 2302(b)(8); 1206(e)(1); 1206(e)(4) of the Senate bill and sections 2302(b)(8)(A); 1206(c)(1)(A); 1206(C)(1)(B); 1206(c)(7)(A); 1206(c)(9); 1206(d)(3) and 1206(e)(1)(c) of the House bill.

The language in the sections cited above does not totally parallel relevant statutes dealing with the protection of this category of information. In order to make the bill(s) more properly conform with existing law, the general phraseology "disclosure not specifically prohibited by law" in all of the aforementioned sections should be replaced by "information not specifically protected from disclosure by law."

REPORT LANGUAGE TO MAKE CLEAR THAT THE ADJUDICATION
AND APPEALS AUTHORITY OF THE CIVIL SERVICE COMMISSION
WOULD BE PASSED AS IS TO THE MERIT SYSTEMS PROTECTION
BOARD (ESTABLISHED BY TITLE II OF S. 2640/H.R. 11280)
PURSUANT TO PRESIDENTIAL REORGANIZATION PLAN NUMBER 2
OF 1978, AND THAT AGENCIES' PRESENT STATUTORY
EXEMPTIONS WOULD REMAIN IN EFFECT

It is suggested that the following language be included in the
Conference Report on the Civil Service Reform Act (S. 2640/H.R. 11280)
at such place as subsection 7701(a) is discussed:

"Any exemptions from the adjudication and appeals authority
of the Civil Service Commission currently enjoyed by agencies
will remain in effect vis-a-vis the adjudication and appeals
authority of the Merit Systems Protection Board contained in
Chapter 77."

TECHNICAL AMENDMENTS TO CORRECT CERTAIN
STATUTORY CITATIONS IN SECTION 2304 OF H.R. 11280

Section 2304 of Title I of H.R. 11280 cites several provisions of existing statutes. The words "as amended" should be added immediately following these citations. The section so amended would read as follows (additional language underlined):

"Sec. 2304. Coordination with certain other provisions of law.

"No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403) as amended, the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), as amended, Public Law 86-36 (73 Stat. 63; 50 U.S.C. 402 note), as amended, and Public Law 88-290 (78 Stat. 168; U.S.C. 831-835), as amended."

REPORT LANGUAGE TO CLARIFY THE STATUS OF THE
CIA VIS-A-VIS LAWS RELATING TO PREFERENCE ELIGIBLES

The CIA is completely exempt from all laws regarding preference eligibles.

Paragraph 7511(a)(1) of both S. 2640 and H. R. 11280 defines "employee" for purposes of establishing rules and procedures for removals or suspensions; subparagraph 7511(a)(1)(B) provides that preference eligibles in the excepted service shall be included in such definition. Paragraph 7511(B)(4) of the Senate bill, S. 2640, provides further that this subchapter does not apply to any agency exempted from coverage of the merit systems principles pursuant to subparagraph 2301(a)(2)(B). Although the CIA is such an agency and therefore exempt from coverage of the provisions of this subchapter of the Civil Service Reform Act, in fact the basis for the Agency's exemptions from all laws regarding preference eligibles is found in Section 8 of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403;). The specific exemption in paragraph 7511(b)(4) of S. 2640, insofar as it includes the CIA, therefore, is unnecessary.

To remove any possible implication that the CIA's exemption from laws regarding preference eligibles could be construed to be derived from paragraph 7511(b)(4) of S. 2640, the following language should be included in the Conference Report on the Civil Service Reform Act at such point as section 7511 is discussed:

"Notwithstanding subparagraph 7511(a)(1)(B), it should be noted that the current enabling statutes for the CIA (the National Security Act of 1947, as amended (50 U.S.C. 403) and the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403a et seq.), exempt the CIA from all laws regarding preference eligibles."